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No. 91-1131

Supreme Court, U.S.
FILED
FEB 26 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

RONALD C. REDCAY
Counsel of Record
ARNOLD & PORTER
Wells Fargo Center-South Tower
44th Floor
355 South Grand Avenue
Los Angeles, CA 90071
(213) 617-4300

PHILIP H. CURTIS
WILLIAM H. VOTH
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
(212) 715-1000

DOUGLAS L. WALD
ANNETTE M. LANG
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Petitioner Winterthur Reinsurance Corp. of America hereby submits this reply brief in support of its petition for a writ of certiorari.

ARGUMENT

1. *The Doctrine of Antitrust Standing Is Still Plagued by Confusion.* Perhaps more illuminating than any argument advanced by the respondents in their consolidated brief is their statement that "[a]s to the claims for damages, each petition advocates a different formulation of [the antitrust standing] test." Resp. Br. 27-28. This is hardly surprising. In the nine years since this Court set forth the new test for antitrust standing in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), the lower courts have failed to come to any consensus on

how to apply that test. Respondents do not contest this fact. Respondents do not suggest that there is any uniformity among lower courts as to whether all the *Associated General Contractors* factors must be met by a plaintiff, or as to what weight should be accorded each of these factors.

Instead, respondents suggest that this Court should ignore the analytical inconsistencies that have arisen in lower court applications of *Associated General Contractors*. Respondents ask this Court to deny Winterthur's petition on the grounds that the court of appeals held "that plaintiffs satisfy each [*Associated General Contractors*] factor for all claims." Resp. Br. 28. Yet the court of appeals did no such thing. The court affirmed the grant of standing because "[a]lmost all of the *Associated General Contractors* factors point to the presence of standing. . . ." Winterthur App. 16a. In short, the question left unanswered by *Associated General Contractors* is of critical importance to this case. If *all* of the *Associated General Contractors* factors must be met for a plaintiff to have standing, then the court of appeals failed to apply the *Associated General Contractors* test for standing correctly.

2. *Respondents' Alleged Injury Was Indirect.* Tellingly, respondents now acknowledge that "the initial victims of the boycott are non-defendant primary insurers. . . ." Resp. Br. 27. In view of this concession, the court of appeals' summary conclusion that respondents suffered a "direct injury" caused by the reinsurers' alleged boycott of primary insurers is simply untenable. Indeed, as the court of appeals itself recognized, "the action of the reinsurers took effect through the primary insurers." Winterthur App. 15a. The vitality of *Associated General Contractors* will be severely sapped if lower courts can close their eyes to undisputed facts and nevertheless label indirect injuries as "direct."

Nor can the court of appeals' holding fairly be characterized as "consistent with the Court's prior decision in *McCready*," as respondents contend. Resp. Br. 27. In *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982), the antitrust plaintiff, McCready, was clearly the *direct* victim of the alleged conspiracy between Blue Shield and the defendant association—*i.e.*, Blue Shield refused to reimburse McCready for expenses *she* incurred when she received treatment from her psychologist. As this Court explained:

> "McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services." *Id.* at 475.

Thus, the injury suffered by the plaintiff in *McCready* was without question a direct injury. Yet in this case, as respondents admit, it is the primary insurers—not the respondents—who are the direct victims of the reinsurers' alleged refusal to sell reinsurance. Resp. Br. 27. Thus, contrary to respondents' argument, their alleged injuries are comparable to the indirect injury of the Union which was denied standing in *Associated General Contractors*. Just as the Union's injury was allegedly caused by the defendants' conspiracy to boycott unionized contractors, the respondents' injuries here were allegedly caused by the reinsurers' conspiracy to deny reinsurance to primary insurers. Similarly, just as the Union in *Associated General Contractors* could not gain standing by alleging that defendants "intended" to injure it (459 U.S. at 545), respondents here cannot gain standing by alleging that reinsurers "intended" to injure them.

3. *Artful Pleading Cannot Be The Basis For Granting Standing.* Despite the fact that respondents never purchased or attempted to purchase reinsurance, they now

contend that they have standing to sue reinsurers because their "complaints plainly allege . . . that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers." Resp. Br. 25 (emphasis in original). Yet a skillful allegation that an antitrust violation in one market (*e.g.*, reinsurance) has repercussions in another market (*e.g.*, primary insurance) cannot magically convert the plaintiff into a "consumer" in a market where he does not purchase. Try as they might, respondents cannot fairly claim to be "consumers" of reinsurance, and they should not be able to sue defendants who allegedly engaged in a concerted refusal to sell reinsurance.

4. *The "Global Conspiracy" Smokescreen Should Not Obscure The Important Standing Issues.* In an apparent effort to deflect this Court's attention from the inconsistent application of *Associated General Contractors* in the lower courts, respondents argue that they are entitled to sue the reinsurers because they have alleged that "the reinsurers are coconspirators of the defendant primary insurers." Resp. Br. 28-29. Respondents theorize that this so-called "global conspiracy claim" means that "[a]ny issues of duplicative liability and allocation can be resolved because all potentially conflicting claimants are joined in the litigation." *Id.* at 29. This is simply wrong.

Even with this co-conspiracy allegation, the reinsurers' alleged restraint is still a restraint in a separate market—the reinsurance market—where respondents are *not* consumers. Respondents' alleged injury is still *indirect;* no respondent purchased or sought to purchase reinsurance from any reinsurer. The allegation that the defendant primary insurers induced the reinsurer conspiracy does not change these facts.

Perhaps most importantly, more than ninety-nine percent of the primary insurers in this country are *not* defendants in this litigation. These non-parties are the

direct victims of the reinsurers' alleged restraint, as respondents now concede. *Id.* at 27. The claims made by respondents who purchased (or were denied) insurance from these non-party primary insurers raise the problems of "duplicative liability and allocation" that antitrust standing limitations are designed to eliminate. *See* 459 U.S. at 543-44. It defies explanation how respondents can assert to this Court that "all potentially conflicting claimants are joined in the litigation." Resp. Br. 29.[1]

5. *Important Issues of Standing Remain Unresolved.* If the court of appeals' decision is not reviewed by this Court, then the goal of achieving uniformity among the lower courts will remain unfulfilled. Lower courts will remain free to sidestep the antitrust standing limitations set down in *Associated General Contractors* simply by characterizing indirect injuries as "direct," and by characterizing plaintiffs as "consumers" without regard to the market in which they purchase. The antitrust standing limitations set down in *Associated General Contractors*—and the policies that underlie these limitations —are too important to be vitiated in this manner.

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[1] Respondents' attempt to compare this case to a suit by consumers against a monopolist is unfounded. See Resp. Br. 30. Consumers who purchase directly from a monopolist at anticompetitive prices are *direct* victims, who can file suit. Competitors of a monopolist who are unlawfully driven out of business are also *direct* victims, who can file suit. Here, in contrast, respondents are neither competitors of reinsurers nor direct purchasers from reinsurers.

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CONCLUSION

For the foregoing reasons, petitioner Winterthur respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD C. REDCAY
Counsel of Record
ARNOLD & PORTER
Wells Fargo Center-South Tower
44th Floor
355 South Grand Avenue
Los Angeles, CA 90071
(213) 617-4300

PHILIP H. CURTIS
WILLIAM H. VOTH
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
(212) 715-1000

DOUGLAS L. WALD
ANNETTE M. LANG
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700
Counsel for Petitioner

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